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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of
ANTHONY T. EASTON

)
) WT Docket No. 97-199
)

To: The Commission

RESPONSE TO COMMENTS OF CLEARCOMM, L.P.

Anthony T. Easton, by his attorneys, hereby submits his response to the "comments" filed in this proceeding by ClearComm, L.P. ("ClearComm"), formerly PCS 2000, L.P. ("PCS 2000"). See Comments of ClearComm, L.P. (Nov. 14, 1997) ("Comments").

Jurisdiction

1. ClearComm's claim that the Commission derives jurisdiction from section 1.2109(d) of its own rules, 47 C.F.R. § 1.2109(d), is fundamentally flawed. See Comments at 4-7. As we argued initially, only Congress can confer jurisdiction. See Petition for Reconsideration at 10 (Oct. 6, 1997). The Commission cannot bestow jurisdiction on itself by promulgating a rule. And, clearly, the fact that the Commission adopts a rule does not mean it has jurisdiction. See generally *Iowa Utilities Board v. FCC*, 120 F.3d 753, 794-80 (8th Cir. 1997).

2. ClearComm's jurisdiction-by-rule argument is that Mr. Easton is subject to the prohibitions and potential penalties of section 1.2109(d), because he was a "bidder" in the C Block auction in January 1996. See Comments at 4. Responding to Mr. Easton's point that PCS 2000 was the "bidder" for the purposes of section 1.2109(d), ClearComm unjustifiably contends that "Mr. Easton's reading of the rules flies in the face of their plain language and

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common sense." Comments at 5. We will show that regardless of how he reads the rules generally, Mr. Easton's reading of section 1.2109(d) comports with the plain meaning of that particular rule.

3. We begin with the fact that section 1.2109(d) was promulgated under the authority granted by section 309(j) of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 309(j). See *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, 9 FCC Rcd 2348, 2349 (1994) ("*Competitive Bidding*"). As used in section 309(j) of the Act, the word "bidder" means an applicant. For example, section 309(j)(5) provides, "No person shall be permitted to participate in a system of competitive bidding pursuant to this subsection unless *such bidder* submits such information and assurances as the Commission may require to demonstrate that *such bidder's application* is acceptable for filing". 47 U.S.C. § 309(j)(5) (emphasis added). ^{1/}

4. ClearComm claims that the penalty provisions of section 1.2109(d) were designed to "prevent fraud in the auction system". Comments at 5. That is not so. The rule was intended to "provide strong incentives for potential bidders to make certain of their qualifications and financial capabilities before the auction so as to avoid delays in the deployment of new services to the public that would result from litigation, disqualification and re-auction." *Competitive Bidding*, 9 FCC Rcd at 2382.

^{1/} See also 47 U.S.C. §§ 309(8)(C) (use of the deposits of "bidders") and 309(14)(D) (prohibited limitations on "qualified bidders" for recaptured television spectrum).

5. ClearComm argues that Mr. Easton was a "bidder" under the rule simply because he was "a person that bids". Comments at 5. ^{2/} That argument is trumped by the "plain meaning" rule of construction. See, e.g., *American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1567-70 (D.C. Cir. 1987). Under that rule, the Commission must give effect to the following clear and unambiguous language:

Bidders who are found to have violated . . . the Commission's rules in connection with their participation in the competitive bidding process may be subject, in addition to other applicable sanctions, to forfeiture of their upfront payment, down payment or full bid amount and may be prohibited from participating in future auctions. ^{3/}

6. When every word and clause of section 1.2109(d) is given effect, the word "bidder" can only refer to an applicant. Only applicants can be subject "[1] to forfeiture of their upfront payment, down payment or full bid amount and [2] may be prohibited from participating in future auctions."

7. ClearComm makes the misleading claim that by promulgating section 1.2109 the Commission "specifically sought the power to 'declare the applicant and its principals ineligible to bid in future auctions, and . . . take any other action that it may deem necessary'." Comments at 7 (quoting *Competitive Bidding*, 9 FCC Rcd

^{2/} Under the Act, the word "person" may include a corporation or partnership as well as an individual. See 47 U.S.C. § 153(32). In this case, the bidder was an applicant partnership (PCS 2000) whose corporate general partner (Unicom Corporation ("Unicom")) retained a corporation (Romulus Telecommunications, Inc. ("Romulus")) to act as its bidding agent.

^{3/} 47 C.F.R. § 1.2109(d) (emphasis added).

at 2383) (emphasis original). However, when the language quoted by ClearComm is placed in context it becomes clear that the Commission envisioned imposing penalties on an applicant's principals in addition to the applicant itself:

. . . [I]f a default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, the Commission also may declare the applicant and its principals ineligible to bid in future auctions, and may take any other action that it may deem necessary including institution of proceedings to revoke any existing licenses held by the applicant. ^{4/}

8. The foregoing discussion confirms that section 1.2109 is directed primarily at the conduct of applicants in the competitive bidding process. Thus, in default or disqualification cases involving serious misconduct "by an applicant", the Commission has jurisdiction to "declare the applicant and its principals ineligible to bid in future auctions." That does not mean that the Commission could find in this case that the applicant (PCS 2000) was qualified, *see PCS 2000, L.P.*, 12 FCC Rcd 1681, 1696-97 (1997) ("*PCS 2000 MO&O*"), and retain jurisdiction to disqualify an officer (Mr. Easton) of the applicant's general partner (Unicom) sixteen months after he resigned his position.

9. ClearComm relies on *Commercial Realty St. Pete, Inc.*, 10 FCC Rcd 4313 (1975) for its contention that Mr. Easton is subject to the Commission's jurisdiction because he was a "former principal" of PCS 2000. Comments at 8. In that case, the Commission issued

^{4/} *Competitive Bidding*, 9 FCC Rcd at 2383 (footnote omitted).

an order to show cause to a corporate applicant and all three of its principals -- Teresa Hartley (the sole shareholder), her husband, James C. Hartley (who allegedly exercised *de facto* control of the corporation) and Ralph E. Howe (the president and sole director). See *Commercial Realty St. Pete*, 10 FCC Rcd at 4314-15, 4320. ^{5/} As ClearComm acknowledges, the three principals "remained with the company." Comments at 8 n.26. Therefore, *Commercial Realty St. Pete* did not involve the issue of whether the Commission has jurisdiction to proceed only against a "former principal".

10. ClearComm notes that the "question of who is responsible for bidding improprieties in the auction context was examined by the Commission in *Commercial Realty St. Pete*." Comments at 5. There, the Commission held that the applicant and its principals were responsible for "gross misconduct". 10 FCC Rcd at 4316. Because it had evidence that the applicant had violated 47 C.F.R. § 1.17 during an auction process, see 10 FCC Rcd at 4316, the Commission had jurisdiction under 47 U.S.C. § 312(b) to order the applicant and its principals to show cause why they should not be disqualified and barred from future auctions, see *id.* at 4320. The Commission had no such jurisdiction with respect to Mr. Easton.

11. As was the case in *Commercial Realty St. Pete*, the Commission expressly found that PCS 2000 was responsible for Mr. Easton's

^{5/} Unlike this case, the Commission gave Mr. and Mrs. Hartley the opportunity to be heard before they were issued a show cause order. They testified for two days during the Commission's investigation of IVDS applicants. See *Commercial Realty St. Pete*, 10 FCC Rcd at 4316. They were also given a hearing on whether they had intentionally misrepresented facts.

alleged misrepresentations. *PCS 2000 MO&O*, 12 FCC Rcd at 1688. However, the Commission did not initiate an evidentiary hearing to determine whether PCS 2000 and its principals engaged in disqualifying misconduct. Rather, the Commission ordered PCS 2000 to forfeit \$1 million, see *PCS 2000, L.P.*, 12 FCC Rcd 1703, 1719 (1997) ("*PCS 2000 NAL*"), which PCS 2000 had volunteered to pay a year before, see *infra* Attachment 1 (Letter of Leon T. Knauer to Thomas Gutierrez (Feb. 22, 1996)). Then, more than seven months after its forfeiture order become final (and long after Mr. Easton resigned from Unicom), the Commission issued its show cause order under 47 U.S.C. § 312(b) against Mr. Easton without finding that he violated any rule.

12. Contrary to ClearComm's claims, Mr. Easton was not designated as a "bidder" or a "bidding agent" on PCS 2000's FCC Form 175. See Comments at 4, 5-6 & n.17. Mr. Easton was named at item 12 of the Form 175 as among the three individuals designated by PCS 2000 as its "authorized representatives" who the Commission would allow to make or withdraw bids at an auction. See FCC Form 175, Instructions at Item 12 (revised Jan. 1994). And the Form 175 was PCS 2000's "[a]pplication to participate in an FCC [a]uction" and PCS 2000 was the applicant that selected the markets for which it "want[ed] to bid." See *id.* at Items 1, 11.

13. Finally, the Commission cannot "review" Mr. Easton's Technician Plus Class operator license and his license for Amateur Radio station WA30YF in this proceeding as ClearComm suggests. See Comments at 9. The Commission is bound to adhere to its own rules, e.g., *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1976), and

to its announced and established procedures, *Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C. Cir. 1976). The Commission has not taken the procedural steps required by law to suspend Mr. Easton's operator license under 47 U.S.C. § 303(m) or to revoke his station license under 47 U.S.C. § 312(c). ^{6/} Regardless, the fact that the Commission could exercise its jurisdiction to suspend or revoke licenses issued to Mr. Easton under Part 97 of the rules does not mean that it had jurisdiction to issue a show cause order to bar him prospectively from holding authorizations in all services.

Due Process

14. Notwithstanding ClearComm's rhetoric, see Comments at 11 ("the changing winds of Mr. Easton's arguments"), there is no inconsistency between Mr. Easton's claim that he had "no opportunity" to adjudicate the issue of whether he was guilty of intentional misconduct and his belief that he would have a "better opportunity" to challenge the Commission's conclusion after the *PCS 2000 NAL* was issued. Mr. Easton's claim went to the denial of his due process rights; his belief went to whether he waived those rights.

15. Mr. Easton's waiver argument is that he did not knowingly waive his due process rights by not seeking reconsideration of the

^{6/} The prerequisite grounds for suspending Mr. Easton's operator license under 47 U.S.C. § 303(m)(1) and for revoking his station license under 47 U.S.C. § 312(a) are different from those necessary to issue a cease and desist order under 47 U.S.C. § 312(b). See generally *Sandra V. Crane*, 7 FCC Rcd 2698 (Priv. Rad. Bur. 1992). Procedurally, the Commission had to issue Mr. Easton (1) a notice of suspension in accordance with 47 U.S.C. § 303(m)(2) and 47 C.F.R. § 1.85, and (2) a notice of violation as required by 5 U.S.C. § 558(c) and 47 C.F.R. § 1.89(a). Neither has been done.

PCS 2000 NAL (where he had no standing under 47 U.S.C. § 503(b)(4)(C)). He was led to believe that he would have a "better opportunity" to make his case when the Commission issued a "subsequent order" specifically addressing his fitness to be a licensee. *PCS 2000 NAL*, 12 FCC Rcd at 1717. Mr. Easton had no reason to believe that the Commission would designate the matter for hearing, but not include specific issues going to whether he intentionally misrepresented facts. Certainly, he was entitled to rely on *Commercial Realty St. Pete*, where issues were designated for hearing going to whether the Hartleys misrepresented facts, lacked candor, or attempted to mislead the Commission. See 10 FCC Rcd at 4320-21.

16. ClearComm claims that Mr. Easton was not denied due process because he participated "fully and independently" in the proceedings leading up to the *PCS 2000 NAL* and, therefore, he was afforded "adequate notice and opportunity for hearing appropriate to the nature of the case." Comments at 10, 11 (quoting *Communications Satellite Corp.*, 3 FCC Rcd 7108, 7111 (1988)). We will show that ClearComm is wrong on all counts.

17. The conduct of the staff's off-the-record investigation did not come close to meeting minimal due process standards. Prompted by Cynthia Hamilton's *ex parte* allegations, the staff acted as investigators making a case against Mr. Easton, not as adjudicators protecting his due process rights. Consequently, Mr. Easton was not afforded adequate notice or the opportunity to be heard.

18. The Wireless Telecommunications Bureau ("Bureau") never notified Mr. Easton of the "specific charges" that had been levelled

against him. *Northwestern Indiana Telephone Co., Inc. v. FCC*, 824 F.2d 1205, 1211 (D.C. Cir. 1987). In particular, the Bureau certainly gave Mr. Easton no notice of Ms. Hamilton's allegations.

19. The staff's investigation began within hours of the PCS 2000 bid, when Ms. Hamilton called the Commission from her home and spoke with Gordon Coffman, an attorney with the Bureau's Enforcement Division. See Hamilton Dep. at Tr. 25-26. The staff knew of Ms. Hamilton's allegations when they called PCS 2000's counsel, Michael Deuel Sullivan, during the evening of January 23, 1996. They did not disclose Ms. Hamilton's accusations to Mr. Sullivan that night nor at their meeting with PCS 2000 officials on January 29, 1996. See *PCS 2000 NAL*, 12 FCC Rcd at 1711. The Bureau apparently was more interested in concealing the Hamilton allegations than in providing notice to Mr. Easton. ^{2/}

20. Mr. Easton was not "aware from the outset" that the Commission was investigating PCS 2000's erroneous bid. Comments at 11. And there is no evidence to support ClearComm's contention that Mr. Easton "clearly knew" that his actions were being scrutinized when he submitted his declaration in support of PCS 2000's January 26, 1996 waiver request. See Comments at 11-12.

21. The Bureau did not advise PCS 2000 that it was investigat-

^{2/} Mr. Easton submits that the Bureau's inquiry should have been "conducted so that the probable result is compliance with the law, not the eliciting of a violation of the law." *United States v. Cowden*, 677 F.2d 417, 420 (8th Cir. 1982). The fact that the staff kept Ms. Hamilton's accusations secret suggests that they were hoping to elicit inculpatory statements from PCS 2000 to compound the alleged misconduct.

ing the bidding error until February 7, 1996. *See infra* Attachment 2 (Letter Michele Farquhar to Javier O. Lamoso (Feb. 7, 1996)). By then, PCS 2000 had already filed its request for a waiver of the Commission's bid withdrawal penalty rule, *see infra* Attachment 3 (Letter of Michael Deuel Sullivan to William F. Caton (Jan. 26, 1996)), and had met with the Chief of the Bureau's Auction Division, *see PCS 2000 NAL*, 12 FCC Rcd at 1711.

22. For her part, Ms. Hamilton did not confront Mr. Easton with her suspicions on the day the erroneous bid was made. *See* Hamilton Dep. at Tr. 24-25. She did not urge him to call the Commission back to correct any possible misstatements. *See id.* at Tr. 18-25. Nor did Ms. Hamilton call the Commission herself in Mr. Easton's presence or tell him that she was going to make that call. *See id.* Rather, Ms. Hamilton retrieved three documents from the trash, took them home with her at lunch, and called the Commission. *See id.* at Tr. 25-27, Ex. 1. After she returned from lunch, Ms. Hamilton did not tell Mr. Easton that she had spoken with Mr. Coffman. *See id.* at Tr. 24-25. She resigned the next morning, *see id.* at Tr. 29, and did not tell PCS 2000 that she had been in contact with the Commission until February 6, 1996, *see* Lamoso Dep. at Tr. 24-25.

23. Ms. Hamilton's accusations did not surface until after the PCS 2000 waiver request had been prepared and filed with the Commission. *See infra* Attachment 4 at 00009-10 (Declaration of Quentin L. Breen (May 28, 1997)), 00013 (Declaration of Cynthia L. Hamilton (May 24, 1997)). *See also* Hamilton Dep. at Tr. 69. Thus, when

Ms. Hamilton finally told her story to Quentin Breen, PCS 2000 had already expressly disavowed any suggestion that its erroneous bid could be attributed to the Commission. See Attachment 3 at 2; Attachment 4 at 00010. Because the question of how PCS 2000 made its erroneous bid was not a material consideration after the waiver request was filed, Mr. Easton had no reason to believe his actions would be scrutinized until the Bureau sought additional information on February 7, 1996.

24. Mr. Easton may have participated "independently" in the pre-PCS 2000 NAL investigation, but he certainly did not participate "fully". For example, Mr. Easton was not allowed to be present to defend himself at the meetings between representatives of PCS 2000 and the staff, see PCS 2000 MO&O, 12 FCC Rcd at 1695, in which he was portrayed as a wrongdoer. ^{8/} PCS 2000 informed Mr. Easton of some of what was discussed with the staff, but the Commission concluded that he had been misinformed. ^{9/}

^{8/} See Opposition to "Petition to Deny for Injunctive Relief", File No. 00414-CW-L-96, at 17 (Aug. 27, 1996) ("Opposition").

^{9/} A PCS 2000 official (Richard Reiss) represented to Mrs. Easton in May 1996 that "high-ranking officials" of the Commission insisted that the SDE Trust divest its interest in PCS 2000. Petition to Deny or for Injunctive Relief, File No. 00414-CW-L-96, Declaration of Susan D. Easton at 1-2 (Aug. 12, 1996). Attorneys for PCS 2000 informed Mr. Easton's counsel that in *ex parte* discussions the staff had insisted that the SDE Trust's interest in PCS 2000 had to be removed before the Commission would grant PCS 2000's applications. Reply to Opposition to Petition to Deny and for Injunctive Relief, File No. 00414-CW-L-96, at Ex. 3 (Sept. 13, 1996). However, the Commission concluded that the "staff did not influence PCS 2000 into changing its ownership structure". PCS 2000 MO&O, 12 FCC Rcd at 1695.

25. ClearComm notes "that Mr. Easton had meetings with the Commission personnel during the fall of 1996 during which he presumably gave his version of the facts." Comments at 13. In point of fact, Mr. and Mrs. Easton and counsel had one meeting with the staff on June 25, 1996 at the offices of the General Counsel. The discussion pertained to Mrs. Easton and the SDE Trust. Mr. Easton was prepared to discuss "his version of the facts" concerning the PCS 2000 bid, but the staff was not interested in hearing from him.

26. The bottom line is that the staff's pre-PCS 2000 NAL investigation did not afford Mr. Easton the fair hearing required by due process. A secret investigation in which evidence is presented *ex parte* cannot provide a due process hearing to the target of the inquiry. "[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights" *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring).

Materiality

27. ClearComm insists that "Mr. Easton's guilt simply was not material to the grant of *ClearComm's* applications." Comments at 14 (emphasis original). We submit that Mr. Easton could not be found guilty in this case, and that his actions were not material to any determination that the Commission was required to make.

28. A "material" fact for the purposes of 47 U.S.C. § 309(e) is "one the Commission finds relevant in making its public interest determination." *Turner Broadcasting Systems, Inc.*, 11 FCC Rcd 19595, 19600 n.18 (1996). A "relevant" fact is one that "poten-

tially [has] decisional significance." *Algreg Cellular Engineering*, 12 FCC Rcd 8148, 8175 (1997). Thus, facts pertaining to Mr. Easton's conduct on January 23, 1997 would be material if they potentially had decisional significance with respect to some Commission public interest determination.

29. The Commission held that the misrepresentations that Mr. Easton allegedly made to its auction personnel were "material", *Westel Samoa, Inc.*, FCC 97-322, at 3 (Sept. 9, 1997), because they "were of decisional significance on the issue of whether or not any withdrawal payment should be assessed against PCS 2000", *PCS 2000 NAL*, 12 FCC Rcd at 1717. That holding had no basis in law or fact.

30. The transcript of Mr. Easton's telephone conversation with Louis Sigalos shows that the two did not discuss a bid withdrawal penalty. Mr. Easton certainly did not ask that a penalty not be assessed against PCS 2000. Moreover, Mr. Easton could not have reasonably believed that a waiver of a potential \$162 million penalty could be requested informally in a telephone conversation with a staff member. Even if Mr. Easton had requested a waiver, any response by Mr. Sigalos would not bind the Commission. See *Hinton Telephone Co.*, 10 FCC Rcd 11625, 11637 (1995); *AAT Electronics Corp.*, 53 Rad. Reg. 2d (P&F) 1215, 1225-26 (1983), *aff'd*, *P&R Temmer v. FCC*, 743 F.2d 918, 927 (D.C. Cir. 1984); *Mobile Telecommunications Corp.*, 49 Rad. Reg. 2d (P&F) 1506, 1511 (1981). Obviously, a waiver of the bid withdrawal penalty had to be requested in writing as required by 47 C.F.R. § 24.819(a).

31. The possibility of a rule waiver first came up in a tele-

phone conference at 7:00 p.m. on the night of the PCS 2000 overbid. According to his deposition testimony, Mr. Sullivan was called by Kathleen O'Brien Ham, Chief of the Bureau's Auction Division, Sue McNeil, a staff attorney, and perhaps another staff member. During that conversation, Mr. Sullivan was asked whether PCS 2000 was blaming the Commission. He responded that PCS 2000 did not know the cause of the overbid. The staff suggested that PCS 2000 submit a request for a waiver of the bid withdrawal penalty and set forth the facts as PCS 2000 knew them.

32. Since the staff requested the submission of a formal waiver request, PCS 2000 clearly knew that the Commission would take no action until it received the request. Therefore, it was not until PCS 2000 filed its waiver request that the Commission was called on to make a public interest determination. By that time, however, the question of whether the Commission caused the bidding error was no longer material. PCS 2000 explicitly represented that the bidding "error occurred in its own bid preparation and submission process" and that it "does not attribute this error to the Commission". Attachment 3 at 2.

33. Mr. Easton's oral, unsworn statements were unrelated to any claim to the Commission. Therefore, those statements were immaterial when made. Moreover, any statements made by Mr. Easton were almost immediately rendered equivocal by Mr. Sullivan's communications with the staff.

34. An hour-and-a-half after Mr. Easton faxed the computer printouts to Mr. Sigalos, Mr. Sullivan transmitted the same material

to Ms. McNeil. Mr. Sullivan informed her that he was transmitting "copies of PCS 2000's printouts of (1) the bids the company *believes* were uploaded to the FCC in Round 11; (2) the company's database file of the active bids as of Round 11; and (3) the company's database file of all markets." See *infra* Attachment 5 (Fax of Mike Sullivan to Sue McNeil (Jan. 23, 1996) (emphasis added)). Mr. Sullivan testified that the staff knew that the computer printouts did not constitute evidence of the bid that PCS 2000 actually transmitted to the Commission. And the waiver request made it clear that Mr. Easton supplied Mr. Sigalos with "copies of spreadsheet printouts indicating the bids that PCS 2000 *believed* it submitted." Attachment 3 at 3 (emphasis added).

35. Any implication that the Commission was to be blamed for the bidding error also was corrected by Mr. Sullivan. He testified that he assured the staff before the PCS 2000 waiver request was filed that PCS 2000 was not blaming the Commission. When he faxed a draft of the waiver request to PCS 2000 on January 25, 1996, Mr. Sullivan urged that the request be filed "as soon as possible in order to (a) reassure the FCC and (b) meet press deadlines." See *infra* Attachment 6 (Fax of Mike Sullivan to Javier Lamoso (Jan. 25, 1996)). He testified that he meant to "reassure" the staff that the Commission was not being blamed for the overbid.

36. The Commission erred when it held that Mr. Easton's statements were of "decisional significance" with respect to whether a withdrawal penalty should be assessed. *PCS 2000 NAL*, 12 FCC Rcd at 1717. Oral statements are not considered in the disposition of

formal waiver requests. Regardless, Mr. Easton's statements were rendered immaterial when they were "almost immediately corrected" by Mr. Sullivan. *Cowden*, 677 F.2d at 420. Any suggestion that PCS 2000 actually bid \$18,006,000 was retracted when it acknowledged that "human error" in its own bid submission process caused the overbid. Attachment 3 at 2. Thus, the "true nature of the bidding error", *PCS 2000 NAL*, 12 FCC Rcd at 1716, was decisionally insignificant to the waiver request as framed by PCS 2000 -- as confirmed by the Bureau's determination that the public interest would be served by the waiver. See *PCS 2000 L.P.*, DA 96-2156, at 7 (Dec. 20, 1996). That determination was made while the staff was still investigating the bidding error. See *Westel Samoa* at 5 n.25.

37. PCS 2000's acknowledgement that its error caused the overbid should have put an end to the matter. However, the staff decided to go forward with its investigation, perhaps because of Ms. Hamilton's repeated contacts with General Counsel (now Chairman) William E. Kennard. See *Hamilton Dep. Tr.* 28-29, 68-69. The Bureau wrote PCS 2000 on February 7, 1996 to request detailed information about its bidding error. See Attachment 2. ^{10/} While it claimed to need additional information "to evaluate the factual basis of PCS 2000's [waiver] request", *id.* at 1, the facts the Bureau sought were not material to the disposition of that request. What the Bureau

^{10/} Once it received the Bureau's written request for information, PCS 2000 fell subject to the requirement that it disclose all the facts the Bureau sought. See 47 C.F.R. § 1.17. Having already taken a leave of absence from Unicom, Mr. Easton was not personally responsible for responding to the Bureau's inquiry.

was after were facts material to Ms. Hamilton's secret allegations.

38. ClearComm now contends that Mr. Easton's conduct was not material to the grant of PCS 2000's applications under section 309 of the Act. See Comments at 14-15. That was not PCS 2000's position prior to the PCS 2000 NAL. To justify its February 20, 1996 offer to the staff to forfeit \$1 million, PCS 2000 argued that its "basic qualifications" were at issue. Attachment 1 at 1. Moreover, the Bureau tentatively decided in May 1996 that Mr. Easton's conduct was material to PCS 2000's applications. On May 20, 1996, PCS 2000 confirmed a published report that the Bureau was reviewing an order designating PCS 2000's applications for hearing. See *infra* Attachment 7 at 3 (Letter of Michael Deuel Sullivan to Tony J. Tanke (May 23, 1996)). However, after a host of former political appointees paraded before the staff on PCS 2000's behalf, see *infra* Attachment 8 at 00001-2 (Letter of Thomas Gutierrez to Reed E. Hundt (June 28, 1996)), the Commission took the unprecedented action of granting PCS 2000's applications without a hearing despite finding that one of its officers had misrepresented facts while acting on its behalf. See PCS 2000 NAL, 12 FCC Rcd at 1714-15. ^{11/}

39. It appears that the matter was not designated for hearing, because PCS 2000 took full advantage of the investigative exemption

^{11/} Through meetings with the staff, PCS 2000 became "fully aware" that its applications would not be granted without a hearing if Mr. Easton would benefit thereby. Opposition at 17. Whereupon, the trust for Mr. Easton's wife was ousted from PCS 2000 on June 18, 1996. See PCS 2000 MO&O, 12 FCC Rcd at 1683. As PCS 2000 anticipated, the Commission granted the applications without a hearing, largely because Mr. Easton no longer held an "attributable interest" in the applicant. *Id.* at 1689.

to the *ex parte* rules to lobby the staff for its own profit. Rather than marshalling a defense to Ms. Hamilton's allegations, PCS 2000 embraced them as the pretext to restructure its ownership and to attach a \$6.5 million escrow account deposited to Romulus. PCS 2000 used its access to the staff to vilify Mr. Easton and to at least obtain the staff's acquiescence to the ouster of the SDE Trust. See *PCS 2000 MO&O*, 12 FCC Rcd at 1695. ^{12/} That strategy paid off handsomely for Mr. Reiss, who effectively acquired the SDE Trust's 38.6% ownership interest in Unicom. See *PCS 2000 NAL*, 12 FCC Rcd at 1705 n.8. Based on ClearComm's SEC filings, the book value of the interest Mr. Reiss acquired was in excess of \$5 million at the end of 1996.

40. It was always in PCS 2000's financial interest to deny Mr. Easton the opportunity to tell his side of the story. Now, ClearComm is attempting to intervene in the *Westel Samoa* hearing to prevent the proceeding from having a "collateral impact" on its state court action against Mr. Easton and to prevent the Bureau from "reopening the inquiry into ClearComm's C Block bid irregularities." Petition to Intervene, WT Docket No. 97-199, at 3-4 & n.8 (Nov. 13,

^{12/} If it had been interested in a fair "process" or the correct "outcome" in its meetings with the staff, see Comments at 13, PCS 2000 would have argued the immateriality of the matter or stressed that it remedied any misunderstanding caused by Mr. Easton by promptly acknowledging that it caused the bidding error. Instead, PCS 2000 claimed that it promptly took "appropriate corrective measures" by removing Mr. Easton from its management and by divesting the trust for his wife of its ownership interest. See *PCS 2000 MO&O*, 12 FCC Rcd at 1699. Of course, PCS 2000 admitted after the fact that Mrs. Easton was completely innocent of any wrongdoing. See Opposition at 13 n.23.

1997). Claiming that the issues pertaining to the overbid "have long ago been resolved", ClearComm warns that it will "strenuously oppose any reexamination of these issues as both unwarranted and violative of res judicata principles. Any further factfinding regarding this matter may have direct and deleterious effect on ClearComm's standing as a Commission licensee." *Id.* at 4 n.8.

41. The reason that ClearComm does not want the matter of the overbid reopened is because it knows that the case it sold the Bureau off-the-record will not stand up in hearing. No lack of candor case can be made against Mr. Easton under the *Algreg* test. See 12 FCC Rcd at 8177. With respect to the crucial telephone call, the Bureau cannot carry its burden of proving that Mr. Easton intended to deceive the Commission, when the evidence shows that he did not know that he was speaking with a member of the Commission's staff. ^{13/} Moreover, the Bureau has insufficient evidence to prove that Mr. Easton even made immaterial misrepresentations.

42. The Commission made the express finding that Mr. Easton contacted the auction staff by telephone and claimed: (1) "that the \$180 million bid was a Commission error" and (2) "that he had supporting documentation that would demonstrate that PCS 2000 had not made the error." *PCS 2000 NAL*, 12 FCC Rcd at 1707. However, the

^{13/} Mr. Easton's call was answered by an unidentified clerical employee from Norrell Temporary Services, a local employment agency. She transferred the call to Mr. Sigalos. Mr. Sullivan testified that Mr. Easton thought Mr. Sigalos was an official with the Commission's auction contractor. Thus, Mr. Sigalos was misidentified in the drafts of PCS 2000's waiver request. See Attachment 6 at 3.

transcript of the recorded portion of the telephone conversation proves that Mr. Easton did not state to Mr. Sigalos that the bid was a Commission error or that he had documents that would demonstrate that PCS 2000 had not made the error. See Attachment 8 at 00007-10. Therefore, if Mr. Easton made those statements -- which he denies -- he must have made them to the "temp" who answered the phone. Any proof of that must come from oral testimony based on the recollections of what was said or overheard nearly two years ago. We believe that such oral testimony without any contemporary corroboration would be insufficient to prove what Mr. Easton actually said. See *United States v. Poutre*, 646 F.2d 685, 688 (1st Cir. 1980).

43. Other findings made by the Commission in its *PCS 2000 NAL* appear to rest not on facts but on opinion or speculation. For example, the Commission found that Mr. Easton sent Mr. Sigalos "forged documents purporting to be original bidding sheets" and that he "delete[d] and destroy[ed] other relevant files." *PCS 2000 NAL*, 12 FCC Rcd at 1715. However, Mr. Easton did not state that the documents were the original bidding sheets, and Mr. Sullivan promptly informed the staff that the documents were printouts of the bids that PCS 2000 "believe[d]" were uploaded to the Commission. And the Commission obviously had no direct evidence that Mr. Easton destroyed "relevant files". See *Westel Samoa*, at 9 n.57.

44. We make these points not to try this case on the pleadings, but to show that the Commission overstated the probative value of the facts the staff obtained during its investigation. Contrary to the Commission's claim that no hearing was necessary to determine

whether Mr. Easton misrepresented facts, see *PCS 2000 NAL*, 12 FCC Rcd at 1714-5, oral testimony and credibility findings were absolutely necessary to determine whether Mr. Easton intentionally made any false statement. Thus, if the Commission felt the need to expend its resources to resolve an entirely immaterial question of fact, Mr. Easton should have been given the opportunity to be heard on the question on the record of an evidentiary hearing. Due process permitted nothing less.

Respectfully submitted,

ANTHONY T. EASTON

By



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December 4, 1997

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February 22, 1996

Thomas Gutierrez, Esq.
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Dear Tom:

This is to respond to your February 20, 1996 letter. Ignoring the intemperate language, a few of your statements must be corrected.

First, you indicate that you were stunned by the offer to make a \$1 million payment on behalf of PCS 2000 at the February 20, 1996 FCC meeting. You were present, however, when the UNICOM Board approved this offer on February 19 in the meeting room at my law firm. You were also informed at that time by Mr. Breen (who was on the conference telephone) of Romulus' offer to underwrite the payment. While you certainly took the position in my office that you preferred no dollar figure be mentioned at the FCC, I do not recall that you registered any objection before the Board. The decision by the Board to offer \$1 million was reasonable in this instance because there is substantially greater financial exposure, the basic qualifications of PCS 2000 are an issue, time is of the essence, and the Commission has the power to deny the waiver request (or grant the request subject to unacceptable conditions), thus bankrupting the company.

Second, you state that you hope I will pass on to the Board, Mr. Kennard's comment that he has never had an applicant offer \$1 million without any determination of wrongdoing. This is not what he said. Mr. Kennard indicated that he was caught by surprise at the submission of the independent counsel report by PCS 2000 and "confession of error." Because PCS 2000 was much farther along in the fact finding process than the FCC, Mr. Kennard also offered that the staff had not yet focused on what action the FCC would take. I should also offer that my subjective impression was that he was favorably impressed by the forthcomingness of PCS 2000 and willingness to deal with the situation.

Third, you indicate that apparently I do not understand that the Commission is faced with a half dozen instances of inadvertent bidding errors in which the FCC may not visit a severe sanction. I think you fail to appreciate that the PCS 2000 situation goes beyond a mere bidding error given the material developed in the independent counsel report. In fact, the FCC has sent

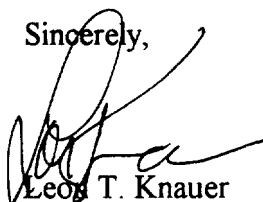
Thomas Gutierrez, Esq.
February 22, 1996
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PCS 2000 a letter inquiry questioning the applicant's activities after the bidding error and ultimately questioning its good faith.

Finally, you have been faxed and sent a copy of our request for blanket confidentiality of the independent counsel report.

Regardless of our differences on strategy, I believe we both agree that we should continue to mutually cooperate with each other to minimize any injury to the innocent interest holders in PCS 2000.

Sincerely,

A handwritten signature in black ink, appearing to be 'L. Knauer', written over the printed name.

Leon T. Knauer

